FILED
OCT 18 1993
OF THE CLERK

No. 92-1183

In The

Supreme Court of the United States

October Term, 1993

STEPHEN A. KNOX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF OF PETITIONER

ALAN SILBER*
HAYDEN PERLE & SILBER
1500 Harbor Boulevard
Weehawken, NJ 07087
(201) 617-5522

*Counsel of Record

LAWRENCE A. STANLEY
26 West 76th Street
New York, NY 10023
(212) 580-4654

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 2

I. The Government's Proposed New Standard to Determine Whether There Has Been An "Exhibition" Must Be Rejected 2

A. The Government's Most Recent Theory Still Runs Afoul of the Plain Meaning of the Statute, Overlooks the Entirety of the Legislative History, and Ignores the Manner in Which the Law Has Always Been Enforced 3

B. The Government's Most Recent Theory Underscores the Importance of Applying the Rule of Lenity to This Case 6

II. The Position of the Government's Amici Arguing For Affirmance Emphasizes the Need to Follow the Plain Meaning of the Statute and the Dangers of Expansive Interpretation 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

People v. Walcher, 515 N.E.2d 319 (Ill. App. 4 Dist. 1987) 4

United States v. Dost, 636 F. Supp. 828 (S.D. Ca. 1986) 10

United States v. Villard, 700 F. Supp. 803 (D.N.J. 1988) 11

STATUTES AND REGULATIONS

18 U.S.C. § 2252 ..... 1, 2

18 U.S.C. § 2256 7

PRELIMINARY STATEMENT

The government has unveiled yet another theory by which it seeks to convince a tribunal that the conduct of Stephen Knox falls within the prohibitions of 18 U.S.C. § 2252(a)(2) and (a)(4)(B). Initially, the government persuaded the district court that an exhibition of the upper part of the inner thigh constituted an exhibition of the pubic area. Subsequently, the government convinced the Court of Appeals that genitalia, even though covered by clothing, could still be exhibited. In opposition to Knox's Petition for Certiorari, the government urged that genitalia which were covered by clothing could also constitute a "simulated exhibition".

The government, in its responding brief, has correctly conceded that the standard used by the Third Circuit was erroneous, and that the statute, by its terms, prohibits lascivious nudity. The government also has correctly conceded that the depictions can be a lascivious exhibition "only if they show minors engaged in the conduct of lasciviously exhibiting their . . . genitals." (GRb 13).[1] However, the government has also urged that the definition of "exhibition" was intended by the Congress to cover depictions where the contours of the genitals may be "visible in some fashion"[2] even if the genitals

---

[1] "GRb" refers to the Brief for the United States, the government's responding brief.

[2] The government uses as an example of covered genitals that may be visible, a child dressed in a transparent garment. Petitioner concedes that if the genitals are covered by transparent material, there can be an exhibition of the genitals. Just as Petitioner has argued that a work of art which is covered by

are covered by opaque material. (GRb 10). This contention has no support in the wording of the statute, its legislative history, or precedent.

The videotapes at issue, without question, do not violate the government's newly-formulated standards. The youngsters depicted in the videotapes are all female and all clothed. Their genitals and pubic areas are neither exhibited nor are they visible in some fashion. The young girls are all engaged in commonplace activities, not acting lasciviously. That government's new test, as it incorporates the "may be visible in some fashion" standard, should be rejected because it is still an expansive interpretation which does violence to the plain meaning of the statute, the statute's legislative history, and the Rule of Lenity.

ARGUMENT

I. The Government's Proposed Standard to Determine Whether There Has Been an "Exhibition" Must Be Rejected.

The district court found Stephen Knox guilty of receiving and possessing videotapes depicting minors engaged in a "lascivious exhibition of the genitals" because it erroneously found that the "uppermost portion of the inner thigh" was part of the "pubic area". The Third Circuit rejected this reasoning, erroneously finding that material at issue illegal under 18 U.S.C. § 2252 *et seq.* because it depicts "lascivious" exhibitions of the genitalia

---

cloth is not exhibited, so is it obvious that a work of art covered by glass *is* exhibited.

"even though those parts of the body are completely covered" by an article of clothing. In the government's Brief in Opposition to Stephen Knox's Petition for a Writ of Certiorari, the government implied that the Nather tapes ran afoul of the law as either "exhibitions" of "covered" genitals, as found by the Third Circuit, or "simulated" exhibitions. (*See* pp. 7-8). Abandoning those claims, the government now argues for an entirely new standard: that is, an "exhibition of the genitals or pubic area" may occur where the clothing renders the genitals or pubic areas "visible in some fashion":

> While visibility does not necessarily require full visual exposure, it requires at least that the body parts themselves be discernible either through or beneath the clothing.

(GRb 10).

> [D]isplays of a child's pubic area under clothing that is so thin and tight as to reveal completely the contours of the genitals . . . could, we think, be considered to be "exhibitions" under the statute.

(GRb 12).

A. The Government's Most Recent Theory Still Runs Afoul of the Plain Meaning of the Statute, Overlooks the Entirety of the Legislative History, and Ignores the Manner in Which the Law Has Always Been Enforced.

Nowhere in any other case has it ever been suggested that an "exhibition" of the genitals or pubic areas could be satisfied simply by the visibility of the "contours" of

those parts of the body.[3] The simple fact is that even under the most recent standard proposed by the government, Petitioner Stephen Knox is still the only person throughout the entire fifteen-year history of the federal child pornography law to have been accused or convicted of a child pornography crime on the basis of depictions of minors whose genitals and pubic areas were fully covered by an opaque article of clothing.

The government's new theory is little better than the Third Circuit's formulation. As the government admits,

> The most natural meaning of [the] term ["exhibition of the genitals or pubic area"] is that one of those parts of the body – rather than the clothing covering them – must be "on exhibit".

(GRb 11).

Thus, if a depiction of the clothing covering the genitals cannot qualify as an "exhibition" under the statute, neither can it qualify merely because the "contours" of the genitals or pubic area might be "visible in some fashion" underneath. (*See* GRb 10). Obviously, an exhibition of clothing where the "contours" of the genitals might be, to some degree, seen, is still only an exhibition of clothing, not an exhibition of the genitals themselves. However, it is an "exhibition of the genitals or pubic area" which the

---

[3] The citation of the Illinois case, *People v. Walcher*, 515 N.E.2d 319 (Ill. App. 4 Dist. 1987) in the *amicus* brief submitted by the National Law Center for Children and Families is completely inapposite since the child's genitals were fully visible, i.e. nude, in some of the depictions at issue and partially visible, i.e. nude, in others.

statute requires in order for a depiction to be found illegal.

The government cites no support in the legislative history for its most recent theory because there is none. Indeed, the government concedes in its Brief for the United States and agrees with Petitioner that the very purpose of the statutory language "lewd exhibition of the genitals" was

> more clearly to delineate what *types of nude portrayals* of children were intended to be encompassed within this definition.

(Emphasis in original). (GRb 11).

The entire legislative history of the statute makes inescapable the conclusion that the statute requires nudity of the genitals or pubic area before there can be an "exhibition".

The only reference to legislative history cited by the government in support of its novel interpretation is this conclusory argument:

> [T]he Justice Department's reference to 'nude portrayals' during the drafting of this statute *does not preclude* interpreting it in this limited fashion, although it rules out the *court of appeals'* more expansive construction.

(Emphasis added). (GRb 12).

Thus, although the government's new interpretation is not *as* expansive as the Third Circuit's, it is still an expansive interpretation contradicted by the plain meaning of the statute. The Rule of Lenity prohibits not only

the Third Circuit's interpretation, but also the government's newly-minted, almost-as-expansive interpretation.[4]

B. The Government's Most Recent Theory Underscores the Importance of Applying the Rule of Lenity to This Case.

Despite having viewed the Nather videotapes, the government cannot even attempt to argue that these videos violate its newly-urged "correct standard". (GRb 20). This is possibly due to the fact that the government is unsure whether the "contours" which are revealed are enough to run afoul of its own interpretation.

Instead, the government merely offers the *possibility* that the Nather tapes "*may* be deemed to be unlawful" (GRb 13), (emphasis added), under the new standard and confesses difficulty in applying it:

> We recognize that a requirement of visibility, even if the body parts are covered, is probably

---

[4] The government's argument that "displays of a child's pubic area under clothing that is so thin and tight as to reveal completely the contours of the genitals would not technically be nude displays, but could, we think, be considered to be 'exhibitions' under the statute" raises the very issues of vagueness and overbreadth discussed by Petitioner's media and publishing amici. Mainstream creators, publishers, producers, distributors and retailers will once again have to guess whether or not the definition applies to their voluminous and widely-distributed materials.

> easier to apply in most cases with respect to boys than girls.

(GRb 12, fn.3).

Nor does the government offer any guidance as to how its "correct standard" is to be applied. Are the contours of *any* part of the genitals or pubic area sufficient to satisfy the test, or must the contours of the genitals as a whole be shown? How defined must the "contours" be? At what point will the clothing covering the genitals be "so thin" or "so tight" as to reveal a sufficient amount of "contour" to run afoul of the law? A careful consideration of these issues and the myriad speculations in which one could engage clearly demonstrate the need to follow the precise definition of the statute: that the genitals themselves, not the clothing or the "contours" of the genitals beneath the clothing, need to be visible in order for an "exhibition" to occur.

Knox is currently under a five-year sentence of incarceration for conduct that has never before been prosecuted and which does not contravene the plain meaning of the statute. The government's shifting theories for prosecution highlight the need for the rigorous application of the Rule of Lenity. Additionally, the government's "creativity" underscores the soundness of Petitioner's argument that Stephen Knox had no notice that his conduct violated the statute and that he did not have the requisite criminal intent. The government's attempt to expand the application of 18 U.S.C. § 2256 beyond what the Congress intended and what the law enforcement community and the public have understood, is constitutionally intolerable. If the Rule of Lenity means anything

at all, then the conviction of Stephen Knox must be reversed without remand.[5]

II. The Position of the Government's Amici Arguing For Affirmance Emphasizes the Need to Follow the Plain Meaning of the Statute and the Dangers of Expansive Interpretation.

The National Law Center for Children and Families ("NLC"), begins its *amicus* brief by inquiring whether Nather's style of videography and advertising contains "lascivious" ideas and then concludes, incorrectly, that "lascivious" ideas mean "lascivious exhibitions of the genitals or pubic area":

> It is impossible to ignore the blatant sexual overtones and dangerous to assume that covered means non-lascivious.

(NLCb 12).[6]

---

[5] Petitioner obviously opposes a remand. However, should the Court order a remand, the case should be returned to the district court for a new trial. Certainly, Petitioner has never been afforded an opportunity for advocacy at the trial level under either the government's newly-proposed theory or the Third Circuit's theory. Because, in pre-trial motions, the district court found an exhibition of the naked "uppermost portion of the inner thigh" could violate the statute, the defendant at the district court attempted to meet only that theory of prosecution.

[6] "NLCb" refers to the Amicus brief of the National Law Center for Children and Families and others. The argument of Amicus, National Family Legal Foundation has already been sufficiently addressed by the Amicus brief of the American Booksellers Foundation and others at p. 22, and by Petitioner in its main brief at pp. 32-35.

> Any reasonable person viewing the tapes and reading the promotional material must conclude that the videotapes contain lascivious exhibitions.

(NLCb 13).

The NLC has, however, read the statute's requirement that an "exhibition" be "lascivious" in an impermissibly broad and expansive manner – in fact, more expansive than any court, including the Third Circuit.[7] A glaring example of this expansive reading of what is "lascivious" is the contention that places such as playgrounds, schools, and swimming pools actually enhance the "lascivious" appeal (and hence the "lascivious" nature) of depictions of children whose genitals and pubic areas are fully covered by clothing:

> Because lasciviousness should be examined in the context of pedophile voyeurs, this Court should view visual images of young girls in playgrounds, schools, and swimming pools as would a pedophile. Pedophiles associate these settings with children, whom, to pedophiles, are highly eroticized sexual objects. It therefore follows as a matter of course that viewing videocassettes of the genitalia of young girls in these

---

[7] Petitioner essentially agrees with the government in its Brief for the United States that "lascivious exhibition[s] of the genitals or pubic area" are ones which "show minors engaged in the conduct of lasciviously exhibiting their (or someone else's) genitals or pubic areas." (GRb 13). *Cf.* Brief of Petitioner, pp. 21-23, in which the application of the word "lascivious" to "exhibitions of the genitals or pubic area" is discussed at length.

> settings permits the pedophile to fantasize about sexual encounters with them.

(NLCb 18).

The NLC offers this bizarre explanation as fulfilling the second factor of a six-factor test enunciated by a district court in *United States v. Dost*, 636 F. Supp. 828 (S.D.Ca. 1986). (*See*, NLCb 17).[8] Apparently, the NLC believes that "playgrounds, schools, and swimming pools" are "sexually suggestive" or places "associated with sexual activity" simply because "pedophiles" are sexually attracted to minors. Under this formulation, any photograph taken at a swimming pool which shows a child in a bathing suit could be deemed a "lascivious exhibition of the genitals" because it would satisfy two prongs of the *Dost* test. According to the Amici, whether the depictions in question focus on the clothing covering the genitals is only one factor in determining whether they are "lascivious" and "no single [*Dost*] factor is dispositive". (NLCb 17).

The NLC's expansive interpretation would allow a finding that the Nather videotapes contained "lascivious exhibitions of the genitals" *regardless* of whether they focused on the clothing covering the genitals. This is because, the NLC explains, it is only "non-pedophiles" who consider

> close-up shots of the genitalia to be the critical issue, while the purchasers of the videotapes

---

[8] Both Petitioner and Respondent now agree that the *Dost* factors do not constitute the correct test to determine whether a given exhibition is "lascivious".

> find *the entirety* of the tapes to be provocative and sexually stimulating.

(Emphasis in original). (NLCb 11).

Thus, any depiction which "pedophiles consider . . . to be lascivious" could be proscribed as child pornography, whether the minors were nude or clothed and whether or not there was a focus on the clothing covering the genitals and pubic area. The newly-created concept of "back-door child pornography", born in the NLC's brief, would unconstitutionally expand this criminal statute to include anything that "pedophiles" might find sexually stimulating. This obviously violates the statute's plain meaning, legislative history, and the enforcement history, which denote a common understanding. Moreover, judicial precedent has taught that "child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo. . . . When a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." *United States v. Villard*, 700 F. Supp. 803, 812 (D.N.J.), and the authority cited in Petitioner's Brief, at 32.

CONCLUSION

For all the reasons above and in Petitioner's initial brief, this conviction must be reversed without remand.

Respectfully submitted,

ALAN SILBER*
HAYDEN PERLE & SILBER
1500 Harbor Boulevard
Weehawken, NJ 07087
(201) 617-5522

*Counsel of Record

LAWRENCE A. STANLEY
26 West 76th Street
New York, NY 10023
(212) 580-4654

Counsel for Petitioner